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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931—No. 20

EARLE & STODDART, INC., *et als.*, Owners of Cargo on the Steamship *Galileo*,

*Petitioners,*

*against*

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship *Galileo*,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAYTON KNATING,
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# INDEX.


PAGE

STATEMENT ..... 1

FIRST POINT:

Section 1 of the Limited Liability Act of March 3, 1851, Commonly Known as the "Fire Statute", Constitutes a Complete Defense to the Owner of the *Galileo* for the Negligence of the Chief Engineer in Causing the Fire on the *Galileo* ..... 4

SECOND POINT:

The Owner of the *Galileo* did not by the Terms of the Bills of Lading Waive the Benefits of the Limited Liability Act of March 3, 1851 ..... 13

LAST POINT:

The Petition for Writ of Certiorari Should be Denied ..... 15

## Table of Cases.


| | PAGE |
|---|---|
| American Hawaiian S. S. Co. *vs.* Pacific S. S. Co., 41 F. (2d) 718 | 10 |
| *Annie Faxon, The,* 75 Fed. 312 | 10 |
| Arkell & Douglass *vs.* U. S., 13 F. (2d) 555 | 8 |
| Bank Line *v.* Porter, 25 F. (2d) 843, 17 F. (2d) 513 | 8 |
| Charbonnier *v.* United States, 45 F. (2d) 166, 174 | 8 |
| *Colima, The,* 82 Fed. 665 | 10 |
| Craig *vs.* Continental Insurance Co., 141 U. S. 638 | 8, 10 |
| Christopher *vs.* Gruby, 40 F. (2d) 8 | 9 |
| *Elizabeth Dantzler, The,* 263 Fed. 596 | 9 |
| *Erie Lighter 108, The,* 250 Fed. 490 | 10 |
| *Etna Maru, The,* 20 F. (2d) 143, 33 F. (2d) 232 | 11, 13 |
| Hines *vs.* Butler, 278 Fed. 877 | 9, 10 |
| Ingram & Royle *vs.* Services Maritime du Treport (1914), 1 K. B. 541 | 9 |
| *Jane Gray, The,* 99 Fed. 582 | 10 |
| Keene *vs. The Whistler,* Fed. Cases No. 7645 | 8 |
| Kitsap County T. Co. *vs.* Harvey, 15 F. (2d) 166 | 10 |
| *Malcolm Baxter, Jr., The,* 277 U. S. 323 | 11 |
| Norwich Company *vs.* Wright, 80 U. S. 104 | 8 |
| Patten-Tulley T. Co. *vs.* Turner, 269 Fed. 334 | 10 |
| Pocomoke Guano Co. *vs.* Eastern T. Co., 278 Fed. 745, 285 Fed. 7 | 10 |
| Providence & N. Y. S. S. Co. *vs.* Hill Mfg. Co., 109 U. S. 578 | 8 |

PAGE

Quinlan *vs.* Pew, 56 Fed. 111 ..... 10

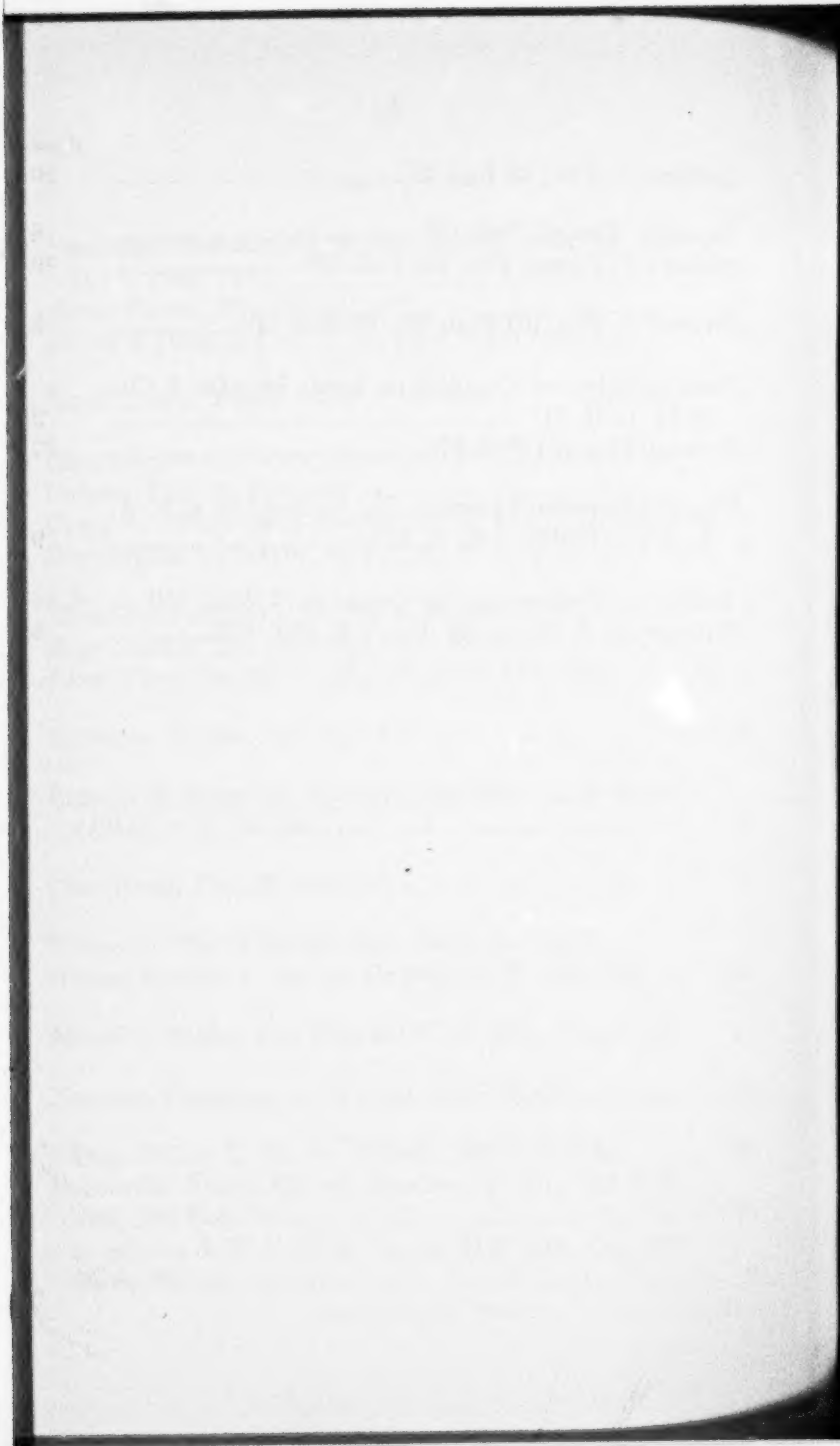
*Republic, The,* 61 Fed. 109 ..... 8
*Richard F. Young, The,* 245 Fed. 499 ..... 10

*Strathdon, The,* 101 Fed. 600, 89 Fed. 374 ..... 8

Tempus Shipping Co., Ltd. *vs.* Louis Dreyfus & Co., 40 Ll. L. R. 217 ..... 9
*Tommy, The,* 151 Fed. 570 ..... 10

Virginia-Caroline Chemical Co. *vs.* Norfolk & N. A. S. S. Co. (1912), 1 K. B. 229 ..... 9

Walker *vs.* Transportation Company, 3 Wall. 150 ..... 6, 14
Williams S. S. Co. *vs.* Wilbur, 9 F. (2d) 622 ..... 8



IN THE

# Supreme Court of the United States

| | |
|---|---|
| EARLE & STODDART, INC., *et als.*, Owners of Cargo on the Steamship *Galileo*, Petitioners, *against* ELLERMAN'S WILSON LINE, LTD., Owner of Steamship *Galileo*, Respondent. | October Term, 1931. No. 809. |

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The opinion of the District Court [S. D. N. Y., Coleman, J.] is reported in 45 F. (2d) 231. The opinion of the Circuit Court of Appeals [C. C. A. 2, Swan, J.] is reported in 54 F. (2d) 913.

Both Courts below made the following concurrent findings of fact and conclusions of law:

1. That the fire which caused the loss of the S.S. *Galileo* and her cargo was entirely due to the negligence of her Chief Engineer in loading a new supply of coal on the coal remaining in the ship's bunkers, which was "heated". It is uncontradicted that the inspection and care of coal involve merely usual and simple duties of a Chief Engineer.

2. That the owner of the *Galileo* had not been guilty of any fault or neglect whatsoever.

3. That the Fire Statute (R. S. 4282, U. S. Code, Title 46, Sec. 182) constituted a complete defense to the owner for the fire, solely caused by the negligence of the Chief Engineer of the *Galileo*.

4. That the owner of the *Galileo* had not waived the Fire Statute by any contract or warranty contained in the bills of lading, but, on the contrary, had expressly contracted that the shipment was subject to the terms of the Fire Statute (R. S. 4282).

On page 3 of the Petition the following statement appears:

> "This defense [Fire Statute] was sustained notwithstanding the circumstance that the shipowner by personal written contract had warranted that 'the owners' (R., p. 698) of the vessel would exercise due diligence to make her seaworthy at the time she was sent to sea from the loading port."

The foregoing quotation is a complete misstatement of the record. Both Courts below made an express finding to the contrary, each Court pointing out that the owner had not waived the Fire Statute by the terms of the bills of lading (R., pp. 740, 790) and had not contracted themselves into a greater and unlimited liability.

The substance of the foregoing quotation, in varying form, is repeated many times in the Petition and accompanying Brief. In view of the findings of both Courts below, we submit, such a statement is wholly unjustifiable. The alleged quotation from the bills of lading on page 4 of Petitioners' Brief is a distortion of the exceptions clause appearing in the bills of lading.

The Petitioners have cited a large number of cases, covering a wide range of legal subjects, which they claim are in conflict with the decisions below, but in a simple case involving the construction of a Federal Statute they do not even quote the terms of the Statute.

We will show that none of these alleged claims of conflict exist in fact.

Obviously, cases which do not involve either the Fire Section or any other section of the Limited Liability Act of March 3, 1851 (U. S. Code, Title 46, Secs. 182-187) have no bearing on the present case, which depended on the language of that particular statute. Similarly, cases which do involve the Fire Section or other sections of the Limited Liability Act of 1851 have no relevancy where the owner was found guilty of fault and neglect, or of privity and knowledge.

In the case at bar both Courts below found that the accident was due solely to the negligence of the Chief Engineer and that the owner was not guilty of any fault or neglect.

In the eighty years since the Limited Liability Act became law not a single case has imposed liability on a shipowner under such circumstances.

## FIRST POINT.

SECTION 1 OF THE LIMITED LIABILITY ACT OF MARCH 3, 1851, COMMONLY KNOWN AS THE "FIRE STATUTE", CONSTITUTES A COMPLETE DEFENSE TO THE OWNER OF THE *Galileo* FOR THE NEGLIGENCE OF THE CHIEF ENGINEER IN CAUSING THE FIRE ON THE *Galileo*.

The Limited Liability Act of March 3, 1851 (c. 43, 9 Stat. 635), as amended, comprising in all six sections, will be found in U. S. Code, Title 46, as Sections 182 to 187, inclusive. Section I (the so-called Fire Statute) and Sections III and VI of the Limited Liability Act of March 3, 1851, read as follows (italics ours):

> "*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.*" 46 U. S. C., s. 182.
>
> "*Liability of owner not to exceed interest.* The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred *without the privity, or knowledge of such owner or owners,* shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U. S. C., s. 183.
>
> "*Remedies reserved.* Nothing in the five preceding sections shall be construed to take away or affect

> the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." 46 U. S. C., s. 187.

It will be observed that the Limited Liability Act of March 3, 1851, did three things:

> First. It relieved the shipowner entirely for a loss happening to or on board a vessel by fire *"unless such fire is caused by the design or neglect of such owner."*
>
> Second. It conferred upon a shipowner the right in any event to limit his liability for any loss occurring *without his privity and knowledge* to the value of his interest in the vessel and her pending freight after an accident.
>
> Third. It reserved to those suffering injury or damage the right to proceed against the master, officers or seamen whose negligence caused the loss.

In other words, the Limited Liability Act of March 3, 1851, relieved the shipowner from the consequences of imputable negligence for losses due to fire, and permitted him, in any event, to limit his liability if the loss was caused without his privity and knowledge.

That the foregoing is a correct and uniform statement of the Statute is supported by a long list of authorities dating back to the time of its enactment.

In *Walker* vs. *Transportation Company*, 3 Wall. 150, a cargo of grain owned by Walker & Co. was shipped on a vessel belonging to the Transportation Company, a common carrier. The vessel caught fire through the negligence of some of her officers and the grain was burned up. Walker & Co. accordingly filed a libel to recover the value of the wheat. The defendant contended that while the wheat was destroyed by fire, the fire was not caused by the "design or neglect" of the shipowner and that he was not liable under the Fire Statute. This defense was excepted to. The exception was overruled. The case was appealed first to the Circuit Court, where evidence was taken which showed the fire was caused by the negligence of the officers of the steamer, and then to the Supreme Court.

The Supreme Court affirmed the decrees below and held that the shipowner was not responsible under the Limited Liability Act of 1851 for a fire caused by the negligence of the master and officers of the vessel, in whose misconduct the owner did not participate personally.

The opinion of the Supreme Court in this case does not show where the fire occurred or what the negligence of the officers was which caused the fire. We have, however, examined the record filed in the office of the Clerk of the Supreme Court. This record shows that at the time the fire occurred, the vessel, after having loaded the libelant's cargo at one pier, had shifted to another pier in the Chicago River, where she was lying at the time of the fire, preparatory to taking on additional cargo before starting on her voyage to Buffalo. The cause of the fire was that, contrary to the necessities of the time, the officers of the ship negligently failed to wet down the fire in the boiler room at night and all went to bed, leaving the vessel unattended. The fire took place owing to the negligent failure of the officers to

wet down the fires and in leaving the vessel with a dangerous fire on board with no one on watch.

The situation presented is identical with the *Galileo*. Obviously the crew in the *Walker* case had not exercised "due diligence".

At page 153 the Court said in the *Walker* case:

> "It is quite evident that the statute intended to modify the shipowner's common-law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect.
>
> "By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.
>
> "When we consider that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.
>
> "If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section, which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

"We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally."

See also:

*Craig* v. *Continental Insurance Co.*, 141 U. S. 638;

*Keene* v. *The Whistler*, Fed. Case No. 7645 (D. C. Cal.);

*The Strathdon*, 89 Fed. 374 (D. C. N. Y.);

*The Strathdon*, 94 Fed. 206; affirmed 101 Fed. 600 (C. C. A. 2);

*Norwich Company* v. *Wright*, 80 U. S. 104, 117;

*Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589;

*The Republic*, 61 Fed. 109, 112 (C. C. A. 2).

In fact, in all cases which we have been able to find where exoneration from liability under the Fire Statute has been denied, there has been proof that the fire was due to the negligence of the owner himself or of some representatives of the owner other than the ship's officers and crew.

*Arkell & Douglas* v. *United States*, 13 F. (2d) 555 (C. C. A. 2);

*Bank Line* v. *Porter*, 25 F. (2d) 843 (C. C. A. 4);

*Charbonnier* v. *United States*, 45 F. (2d) 166 (E. D. S. C.), affirmed in 45 F. (2d) 174 (C. C. A. 4);

*Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622 (C. C. A. 9);

*Christopher* v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1);
*Hines* v. *Butler*, 278 Fed. 877 (C. C. A. 4);
*The Elizabeth Dantzler*, 263 Fed. 596 (E. D. Va.).

Our Fire Statute was taken from an earlier British Act (26 Geo. III, c. 86), as was pointed out in *Norwich Insurance Company* v. *Wright*, 80 U. S. 104, 117. The present British Statute, 57 and 58 Vict., c. 60, sec. 502, par. (i), is practically identical with our own. It reads:

> "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:
>
> (i) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

It is well settled under British law that a shipowner does not lose exemption from liability for loss by fire because the ship's officers have failed to exercise due diligence to make the vessel seaworthy when her voyage starts. *Virginia-Carolina Chemical Co.* v. *Norfolk & North Am. S. S. Co.* [1912], 1 K. B. 229; *Ingram & Royle* v. *Services Maritimes du Treport* [1914], 1 K. B. 541; *Tempus Shipping Co.* v. *Louis Dreyfus & Co.*, 40 Lloyd's L. L. 217, 219.

The English Courts, as well as the Courts below, declined to legislate into the statutes the additional exception not found in the statutes that "due diligence to make the vessel seaworthy must be used by the ship's officers".

The difference between the Limited Liability Act and the Harter Act, which does require "due diligence" as a

condition precedent to its benefits, is succinctly pointed out by Judge Swan below. R., p. 787.

The Petitioners' position, in short, is that the owner of a vessel, who has been guilty of no fault or neglect, is not relieved from liability for a fire unless all the ship's officers have exercised due diligence to make the vessel seaworthy on sailing, and, similarly, an owner cannot limit his liability to the value of the ship and freight following a disaster, *even though he is without privity and knowledge,* unless the ship's officers have exercised due diligence to make the vessel seaworthy on sailing. This extraordinary proposition is, of course, contrary to countless decisions of this Court and of the Courts of other circuits.

*Quinlan* v. *Pew,* 56 Fed. 111 (C. C. A. 1);
*The Annie Faxon,* 75 Fed. 312 (C. C. A. 9);
*La Bourgogne,* 210 U. S. 95;
*The Colima,* 82 Fed. 665 (S. D. N. Y.);
*The Jane Gray,* 99 Fed. 582 (D. C. Wash.);
*The Tommy,* 151 Fed. 570 (C. C. A. 2);
*The Richard F. Young,* 245 Fed. 499 (E. D. Va.);
*The Erie Lighter 108,* 250 Fed. 490 (D. C. N. J.);
*Patton-Tulley Transportation Co.* v. *Turner,* 269 Fed. 334 (C. C. A. 6);
*Hines* v. *Butler,* 278 Fed. 877, affirming 264 Fed. 986 (C. C. A. 4);
*Pocomoke Guano Co.* v. *Eastern Trans. Co.,* 278 Fed. 745 (D. C. Md.), affirmed 285 Fed. 7 (C. C. A. 4);
*Kitsap County Transportation Co.* v. *Harvey,* 15 F. (2d) 166 (C. C. A. 9);
*Craig* v. *Continental Ins. Co.,* 141 U. S. 638;
*American-Hawaiian S. S. Co.* v. *Pacific S. S. Co.,* 41 F. (2d) 718 (C. C. A. 9).

Contrary to the assertion of the Petitioners, the decision of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, is not in conflict with any of the authorities above cited. As pointed out by Judge Swan in his opinion below, the owners of the *Malcolm Baxter, Jr.*, were *guilty of "privity and knowledge"* in connection with the unseaworthiness of the *Baxter* and for this reason were properly denied limitation of liability. Here concededly the owner was neither at fault nor guilty of privity and knowledge. The distinction between the innocence of the owner of the *Galileo* and the guilt of the owner of the *Baxter* is vital.

The only case which in any way supports the Petitioners' contention with respect to the Limited Liability Act of March 3, 1851, is the District Court's decision in *The Etna Maru*, 20 F. (2d) 143 (D. C. Texas), affirmed on another and wholly different ground in 33 F. (2d) 232.

That was a libel *in rem* by the cargo interests against the steamer *Etna Maru*. In the District Court it appeared that the owners of the steamer had made a personal contract in the form of a charter party containing an express warranty of seaworthiness by the owner. It further appeared that there was a *physical defect in the steamer itself*, which made the steamer unseaworthy and which had been directly responsible for a fire.

The case was tried before Judge Hutcheson in the Southern District of Texas.

The District Court held that the owners had a nondelegable duty of furnishing a seaworthy ship, both by an express contract and as a matter of general law. The express contract of the owner was enough to dispose of the case because he contracted himself out of the statute.

But disregarding all authorities on the subject of the Limited Liability Act of 1851, including many decisions of

this Court, the District Court delivered the following *dictum* with respect to the Limited Liability Act, R. S. 4282-4287:

> "That the right to limitation or exemption is to be sought in the whole text of the acts [R. S. 4282-4287] and that they plainly mean to say that the owner may have limitation or protection against the acts of the officers of the ship, the master, and of the crew, who are in charge of and navigating his ship on her voyage, but that the owner is responsible for the proper discharge of those duties with reference to seaworthiness before the beginning of a voyage, which are properly chargeable as non-delegable duties to the owner, whether he undertakes personally to discharge them or delegates them to others."

This view of the law, of course, would deprive any shipowner of the right to limit liability even where he had been guilty of no privity or knowledge, if the ship was unseaworthy and due diligence had not been exercised by some of the crew to make her seaworthy.

Such is not the law by overwhelming authority. The exact contrary has been held by this Court in many cases. See the cases cited on pages eight and ten of this brief.

The case of the *Etna Maru* was appealed to the Circuit Court of Appeals for the Fifth Circuit, 33 F. (2d) 232, where the Court reached the decision that the Limited Liability Act of 1851 did not apply at all, because the action was *in rem* against the steamer and not *in personam* against the owners. The Court thought that the Limited Liability Act of 1851 only relieved the owners personally, and not the ships.

The District Court was affirmed, therefore, on another and wholly different ground, to-wit: that the Limited Lia-

bility Act of 1851 has no application to actions *in rem*, but only to actions *in personam*.

There is no such point involved in the present case, and hence there is no conflict whatsoever between the decisions below and the decision of the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232.

## SECOND POINT.

THE OWNER OF THE *Galileo* DID NOT BY THE TERMS OF THE BILLS OF LADING WAIVE THE BENEFITS OF THE LIMITED LIABILITY ACT OF MARCH 3, 1851.

In both Courts below Petitioners argued at great length that the owner of the *Galileo* by the terms of the bills of lading waived the benefits of the Limited Liability Act of March 3, 1851, and contracted themselves into a greater and unlimited liability. This question obviously involved merely a matter of simple contract construction. It was decided adversely to the Petitioners in both courts. The Petitioners have thus had their day in two courts on a simple contract question of no importance except to the litigants engaged here.

There were eighteen forms of bills of lading covering the merchandise mentioned in the libel. Nine of the eighteen bills of lading contained the following clause:

> "This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

In the other nine bills of lading the clause read as follows:

> "IT IS ALSO MUTUALLY AGREED that this shipment is subject to all the terms and provisions of, and all

> the exemptions from liability, contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled an 'Act relating to the navigation of vessels,' etc., and to Sections 4281 and 4287, each inclusive, of the United States Statutes."

R. S. 4282-4287 comprise the Limited Liability Act of March 3, 1851. R. S. 4282, which is expressly incorporated in all forms of the bills of lading in this case is the Fire Section quoted at page four of this brief.

The precise meaning and effect of R. S. 4282 has been determined by this Court in *Walker* v. *Transportation Co.*, 3 Wall. 150.

Instead, therefore, of the owner in this case having waived the benefits of the Fire Section of the Limited Liability Act, and contracted himself into a greater liability, the shipowner has made an express contract that he shall have the benefit of the Fire Statute.

It must be borne in mind that the Petitioners contended under this point that the shipowner made a special contract in the bills of lading waiving the provisions of Sections 4281 to 4287, inclusive, of the Revised Statutes and that the shipowner has by special contract in the bills of lading agreed that he should not have the benefit of the exemptions contained in the Limited Liability Act, including, of course, the right to limit liability.

In the light of the terms of the bills of lading giving the shipowner the right to all exemptions from liability contained in Sections 4282-4287 of the United States Revised Statutes, it is a little difficult to understand how it can be seriously argued that the shipowner has made a special contract expressly waiving the provisions of Section 4282 and has agreed to a greater and unlimited liability.

At any rate, this point involves merely a matter of construction of a contract of no special public importance, which has been decided adversely to the Petitioners in two Courts.

## LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

CLETUS KEATING,
Counsel for Respondent.

Dated: New York, March 31, 1932.